Ting Hua Yiew v Ace Commercial Enterprise Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG 44 OF 1993/II
ABDUL KADIR SULAIMAN J
12 FEBRUARY 1996

Civil Procedure *— Pleadings — Sriking out defence (part of) — Application made subsequent to summons for directions — Court not informed of pending application by plaintiff for further and better particulars from defendant at hearing of summons for directions — Whether court could entertain application to strike out defence now — Rules of the High Court 1980 O 25*

Civil Procedure *— Affidavit — In support of application to stike out defence — Served on defendant beyond 14 days — No application for extension of time — Whether fatal — Rules of the High Court 1980 O 32 r 13(2)(a)*

Words and Phrases *— 'Must' — Rules of the High Court 1980 O 32 r 13(2)(a)*

The plaintiff in this case instituted a writ action against the defendant claiming a sum of money. On 17 May 1993, the defendant filed his defence. The plaintiff then filed a summons in chambers for further and better particulars in connection with the defendant's statement of defence on 11 June 1993. On 26 June 1993, the plaintiff took out a summons for directions under O 25 of the Rules of the High Court 1980 ('the RHC') and sought directions for trial, which were granted on 30 October 1993. However, it was not disclosed to the court that the plaintiff had an outstanding application for further and better particulars. On 24 November 1993, following the order upon the summons for directions — and despite the fact that the further and better particulars from the defendant had still not been received — the plaintiff filed a request for setting down the action for trial. By a consent order of 3 March 1994, the defendant had been granted 30 days to supply the particulars the plaintiff required. As it turned out, the defendant filed the further and better particulars only on 28 April 1994. On 30 April 1994, the plaintiff filed an application to strike out certain paragraphs of the defence and 'for the sum of RM470,750 as prayed in prayer (6) of the statement of claim with interest thereon ...' ('the plaintiff's application'). The plaintiff's application was made based on all the grounds stated in O 18 r 19(1) of the RHC and under the inherent jurisdiction of the court. At the commencement of the hearing, counsel for the defendant raised a preliminary objection relating to the plaintiff's application. It was contended that the court should not entertain the plaintiff's application at this late stage of the proceedings, after the order on the summons for directions had been given and the plaintiff had taken steps to notify the setting down of the action for trial prior to the application. Counsel for the defendant also contended in his preliminary objection that the affidavit in

support of the plaintiff's application could not be admitted as evidence because it was served on the defendant three days beyond the 14 days allowed by O 32 r 13(2)(a) of the RHC, and there was no application by the plaintiff for extension of time to serve the affidavit in support.

Held, dismissing the application with costs:

(1) In the first place, there was no prayer (6) in the plaintiff's statement of claim which by this application the plaintiff wanted the judgment to be entered upon. Thererefore, it was not clear as to how the plaintiff arrived at the figures contained in his application (see pp 682G and 683B).

(2) The purpose of summons for directions is for the consideration by the court of the preparations for the trial of the action so that all interlocutory matters under O 18 r 19 of the RHC would be dealt with. Order 25 r 7(1) requires the plaintiff in this case to apply for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application. However, there was nowhere to suggest that on the hearing of the summons for directions the court was informed of the pending application of the plaintiff for further and better particulars from the defendant (see p 684B–C).

(3) Considering the events that happened leading to the giving of the direction upon such summons taken up by the plaintiff, and his conduct in not disclosing the matter of his pending application, this application was not a proper one (see p 684F).

(4) If the fact that the plaintiff was waiting for further and better particulars from the defendant was before the court at the hearing of the summons for directions, the consideration by the court upon the summons could be adjourned to another date pending the supply of the further and better particulars by the defendant to the plaintiff. But in the present case, the fact was not before the court. Hence the directions given on 30 October 1993 in preparation for the trial of the action (see p 685E–G).

(5) It was too late now for the court to consider the plaintiff's application after an order made upon the summons for directions. By the time an order is made, it is to be presumed that whatever issue there is, that issue needs to be resolved at the full trial of the action (see p 685G).

(6) Order 32 r 13(2)(a) uses the imperative word 'must' which, in its ordinary meaning, is a word of absolute obligation. Therefore, the failure of the plaintiff in serving the affidavit in support upon the defendant within the time limit allowed by the rule rendered the said affidavit inadmissible. Order 2 r 1 of the RHC was of no

help to the plaintiff as no reason was put forward for the delay in the service of the said affidavit. Hence, the application of the plaintiff was left without any supporting evidence (see p 686A–B).

[Bahasa Malaysia summary

Plaintif dalam kes ini telah memulakan satu tindakan writ terhadap defendan untuk menuntut sejumlah wang. Pada 17 Mei 1993, defendan telah memfailkan pembelaan. Plaintif kemudiannya memfailkan saman dalam kamar untuk mendapatkan butir lanjut dan jelas berhubung dengan pernyataan pembelaan defendan pada 11 Jun 1993. Pada 26 Jun 1993, plaintif telah mengambil suatu saman untuk arahan di bawah A 25 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KTN') dan meminta arahan untuk perbicaraan, yang telah pun diberikan pada 30 Oktober 1993. Bagaimanapun, mahkamah tidak diberitahu bahawa plaintif masih menunggu keputusan permohonan untuk butir lanjut dan jelas. Pada 24 November 1993, berikutan perintah ke atas saman untuk arahan — dan walaupun butir lanjut dan jelas daripada defendan masih belum diterima — plaintif telah memfailkan permintaan untuk penetapan tindakan untuk perbicaraan. Melalui suatu perintah persetujuan bertarikh 3 Mac 1994, defendan telah diberikan 30 hari untuk memenuhi permintaan plaintif. Namun demikian, defendan memfailkan butir lanjut dan jelas hanya pada 28 April 1994. Pada 30 April 1994, plaintif memfailkan suatu permohonan untuk membatalkan perenggan tertentu dalam pembelaan dan untuk 'jumlah wang sebanyak RM470,750 seperti yang diminta dalam permohonan (6) pernyataan tuntutan dengan faedah ke atasnya' ('permohonan plaintif'). Permohonan plaintif telah dibuat berdasarkan kesemua alasan yang terdapat dalam A 18 k 19(1) KTN dan di bawah bidang kuasa sedia ada mahkamah. Di permulaan pembicaraan, peguam untuk defendan membangkitkan bantahan permulaan berkaitan dengan permohonan plaintif. Ia telah dihujahkan bahawa mahkamah tidak patut melayani permohonan plaintif pada tahap prosiding yang begitu lewat, selepas perintah ke atas saman untuk arahan diberikan dan plaintif telah pun mengambil langkah untuk memberitahu penetapan tindakan untuk perbicaraan sebelum permohonan tersebut. Peguam defendan juga berhujah dalam bantahan permulaan bahawa afidavit yang menyokong permohonan plaintif tidak boleh diterima sebagai bukti sebab ia disampaikan ke atas defendan tiga hari lebih daripada 14 hari yang dibenarkan oleh A 32 k 13(2)(a) KTN, dan tiadanya permohonan oleh plaintif untuk pelanjutan masa bagi menyampaikan afidavit yang menyokong.

A **Diputuskan**, menolak permohonan dengan kos:

(1) Pertama sekali, tidak terdapat permohonan (6) dalam pernyataan tuntutan plaintif yang plaintif ingin penghakiman untuk dimasukkan. Oleh yang demikian, adalah tidak jelas bagaimana plaintif memperolehi angka-angka yang terkandung dalam B permohonannya (lihat ms 682G dan 683B).

(2) Tujuan saman untuk arahan ialah untuk membolehkan mahkamah membuat pertimbangan atas persediaan untuk perbicaraan tindakan, supaya semua perkara interlokutori di bawah A 18 k 19 KTN boleh diuruskan. Aturan 25 k 7(1) memerlukan plaintif dalam kes ini memohon untuk mendapatkan apa-apa perintah C atau arahan yang dikehendakinya mengenai apa-apa perkara yang boleh diuruskan berdasarkan suatu permohonan interlokutori. Walau bagaimanapun, tiada terdapat apa-apa yang mencadangkan bahawa mahkamah telah diberitahu tentang permohonan plaintif untuk butir lanjut dan jelas daripada defendan yang belum selesai, D semasa pembicaraan saman untuk arahan (lihat ms 684B–C).

(3) Memandangkan peristiwa yang berlaku yang menyebabkan pemberian arahan terhadap saman yang diambil oleh plaintif, dan kelakuan plaintif tidak mendedahkan perkara berhubung dengan permohonan yang belum selesai, permohonan ini adalah E tidak betul (lihat ms 684F).

(4) Jika fakta bahawa plaintif sedang menunggu butir lanjut dan jelas daripada defendan dikemukakan di mahkamah di pembicaraan saman untuk arahan, pertimbangan saman itu oleh mahkamah boleh ditangguh kepada tarikh lain sementara menunggu pembekalan butir lanjut dan jelas oleh defendan kepada plaintif. F Tetapi dalam kes ini, fakta tersebut tidak dikemukakan di mahkamah. Maka, arahan yang diberikan pada 30 Oktober 1993 adalah sebagai persediaan untuk perbicaraan tindakan itu (lihat ms 685E–G).

(5) Adalah terlalu lambat sekarang untuk mahkamah G mempertimbangkan permohonan plaintif selepas perintah terhadap saman untuk arahan telah pun dibuat. Setelah sesuatu perintah dibuat, harus dianggap bahawa jikapun terdapat apa-apa isu, ia perlu diselesaikan di perbicaraan penuh tindakan itu (lihat ms 685G).

H (6) Aturan 32 k 13(2) memakai perkataan imperatif 'mestilah' yang merupakan suatu perkataan obligasi mutlak dalam maksud biasa. Justeru itu, kegagalan plaintif dalam menyampaikan afidavit ke atas defendan dalam had tempoh yang dibenarkan oleh kaedah itu menyebabkan afidavit tersebut tidak boleh diterima. Aturan 2 k 1 KTN tidak dapat membantu plaintif sebab tiada alasan telah I diberikan bagi kelewatan dalam penyampaian afidavit tersebut.

Maka permohonan plaintif tidak mempunyai sebarang bukti yang menyokong (lihat ms 686A–B).]

Notes

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2506–2772.

For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204..

Cases referred to

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1987] 2 MLJ 633

Datuk (Datu) Amir Kahar bin Tun Hj Mustapha v Tun Mohd Said Keruak & Ors [1994] 3 MLJ 737

Legislation referred to

Rules of the High Court 1980 O 2 r 1, O 18 r 19(1), O 25 r 1(4), r 7(1), (3), O 32 r 13(2)(a)

Margaret Loy (*Chan Kho & Loy*) for the plaintiff.
Basil Chai (*Chai & Co*) for the defendant.

Abdul Kadir Sulaiman J: By summons in chambers, the plaintiff sought to strike out certain paragraphs of the defence of the defendant and to enter final judgment 'for the sum of RM470,750 as prayed in prayer (6) of the statement of claim with interest thereon at the rate of 12% per annum from the date of the writ of summons till judgment, and at the rate of 8% per annum from the date of judgment till final payment, and costs to be taxed, including the costs of this application.' The application is made based on all the grounds stated in O 18 r 19(1) of the Rules of the High Court 1980 ('the RHC'), and under the inherent jurisdiction of the court. In the first place, upon the perusal of the statement of claim of the plaintiff issued on 7 April 1993 there is no prayer (6) in the said statement which by this application the plaintiff wants the judgment to be entered upon. The statement of claim contains prayers for:

(a) special damages in the sum of RM334,302.58 and the sum of RM75,750;

(b) alternatively, restitution of the sum of RM395,000 and the sum of RM75,750;

(c) general damages;

(d) exemplary damages;

(e) interest on the damages at the rate of 12% per annum from the date of the writ summons to final payment;

(f) further or other relief; and

(g) costs.

Therefore, it is not quite clear as to how the plaintiff arrived at the figures as contained in his prayer to this application. The affidavit in support is of no assistance either. Be that as it may, at the commencement of the hearing of this application of the plaintiff, the learned counsel for the defendant raised a preliminary objection relating to this application. It is the contention of the defendant that this court should not entertain this purported striking out application at this very late stage of the proceedings in the suit, as before this application was made, the order on the summons for directions had been given and the plaintiff had in the meanwhile taken steps to notify the setting down of the action for trial. The learned counsel cited *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633 in support of the contention which states that such an application must be refused after the action has been set down for trial. He also cited my own dicta in *Datuk (Datu) Amir Kahar bin Tun Hj Mustapha v Tun Mohd Said Keruak & Ors* [1994] 3 MLJ 737 at p 742 as follows:

> In a writ action, various interlocutory stages precede the setting down of a case for hearing and in between this period, the parties would have ample opportunity to scrutinize the pleadings and to consider other available evidence in the meantime before making a decision whether to file such a nature of application. Therefore, it is proper that if the application is made after the action has been set down for trial, the application must be refused.

I said this in comparison to an application to strike out an originating summons made soon after the hearing date had been fixed where there was to be no such protracted procedures to follow as so found in the writ action.

In the present writ action of the plaintiff, the defendant filed its defence containing the impugned paragraphs on 17 May 1993. On 11 June 1993, the plaintiff filed a summons in chambers for further and better particulars in relation to certain paragraphs in the defendant's statement of defence which include the impugned paragraphs. By a consent order of 3 March 1994 the defendant was given 30 days to supply the required particulars. Meanwhile, on 26 July 1993, the plaintiff took out summons for directions under O 25 of the RHC wherein appropriate directions as sought by the plaintiff were given on 30 October 1993. Before the court, there was no indication that the plaintiff had an outstanding application for further and better particulars. Parties were each given 30 days to serve the list of documents and two weeks to inspect them. Seven days were allotted for the trial of the action to be set down within 30 days after the inspection of the documents. It would have been thought that by taking out the summons for directions under O 25 of the RHC, the parties —

particularly the plaintiff by asking for directions as given by the court on 30 October 1993 — were ready for trial on the various triable issues. Following the order upon the summons for directions, the plaintiff on 24 November 1993 filed the request for setting down the action for trial, even though the further and better particulars sought from the defendant by his application of 11 June 1993 was yet to come. No doubt the setting down for trial was done pursuant to the direction of the court in the summons for directions. But in my view, the plaintiff cannot use this as a reason to allow the court to consider his present application because at the summons for directions stage, all these matters were never disclosed to the court. The purpose of summons for directions is for the consideration by the court of the preparations for the trial of the action so that all interlocutory matters such as the nature of the present application of the plaintiff for striking out of pleadings under O 18 r 19 of the RHC would be dealt with. Order 25 r 7(1) requires the plaintiff in this case to apply for any order or directions which he may desire as to any matter capable of being dealt with on an interlocutory application. However, when taking out the summons for directions, only those items given in the order upon the summons for directions were sought by the plaintiff. There is nowhere to suggest that on the hearing of the summons for directions, the court was informed of the pending application of the plaintiff of 11 June 1993 for further and better particulars from the defendant. This further and better particulars sought by the plaintiff was filed by the defendant on 28 April 1994 pursuant to the consent order mentioned earlier, which was after the setting down of the action for trial. Following that the plaintiff on 30 April 1994 filed this application to strike out the impugned paragraphs of the defence. On the face of it, following the sequence of events, it would appear that this application of the plaintiff was made very promptly on the receipt of the further and better particulars from the defendant. However, considering the events that happened leading to the giving of the direction upon such summons taken up by the plaintiff, and his conduct in not disclosing the matter of his pending application, I do not think that this application of the plaintiff is a proper one. The matter must be left to the trial judge in the course of the trial to resolve the issue. Order 25 r 7(3) allows an application to be made subsequent to the summons for directions and before judgment as to any matter capable of being dealt with on an interlocutory application. It must be made under the summons by giving two clear days' notice to the defendant stating the grounds of the application. It might be thought that the plaintiff in this action, can avail himself of the provisions of this rule because he was only supplied with further and better particulars only after the order under the summons for directions. However, upon considering the *Supreme Court Practice* 1988 (the White Book), it is clear that the subsequent application referred to in the rule is not just any interlocutory application but it refers to such application for summons for directions under r 1 which could not reasonably have been made on the original hearing of the summons for sufficient reason or other fresh developments which I do not think that this nature of the present application of the

A plaintiff relates. Otherwise, the court will be flooded with such nature of application as the plaintiff's made right to the day before the trial of the action itself. That would clearly defeat the very purpose of the requirements for summons for directions in an action. Order 25 r 1 requires that the summons for directions must be taken within one month after the pleadings in the action are deemed to be closed. This the plaintiff has done in this case. This grace period of one month is given for good reason so as to allow the parties time to ponder over the pleadings of the opposite party and consider whatever appropriate summary application necessary to be made before the one-month period is up. For that reason, Zakaria Yatim J (as he then was) in *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633 at p 635 citing 1 *Supreme Court Practice* 1985 at p 304 said:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial.

The plaintiff is given, by the rule, a period of one month after the pleadings are deemed to be closed to take out a summons for directions. This he must do as otherwise the defendant may do so or apply for an order to dismiss the action pursuant to O 25 r 1(4). But in the meanwhile the plaintiff was waiting for the further and better particulars from the defendant. If this fact was before the court upon the hearing of the summons for directions, the consideration by the court upon the summons could reasonably be adjourned to another date pending the supply of the further and better particulars by the defendant to the plaintiff, for the rule permits the court to do so. In the meantime, upon the receipt of the said further and better particulars the plaintiff could make a decision one way or another on the next course of action to be taken. But in the present case, the fact was not before the court. Hence the directions given on 30 October 1993 in preparation for the trial of the action. Therefore, it is too late in the day now for the court to consider his present application after an order made upon the summons for directions. By the time the order is made, it is to be presumed that whatever issue there is, that issue needs to be resolved at the full trial of the action. For that reason alone, I would dismiss this application of the plaintiff.

The learned counsel for the defendant in his preliminary objection also brought out another issue. He contends that the affidavit in support of this application of the plaintiff cannot be admitted as evidence based on the provisions of O 32 r 13(2)(a) of the RHC because the said affidavit in support was served on the defendant three days beyond the 14 days allowed by the rule. This application of the plaintiff, with the affidavit in support attached, was filed on 30 April 1994. Therefore, for the purposes of O 32 r 13(2)(a), the said affidavit must be served on the defendant within 14 days from 30 April 1994. However, according to the learned

counsel, it was served only on 16 May 1994. There was, however, no application made by the plaintiff for extension of time to serve the said affidavit in support. Order 32 r 13(2)(a) uses an imperative word 'must'. In its ordinary meaning, it is a word of absolute obligation. Therefore, for the failure of the plaintiff to have the affidavit in support served upon the defendant within the time limit allowed by the rule, I would agree with the submission of the learned counsel for the defendant that it renders the said affidavit inadmissible. Order 2 r 1 of the RHC would not be of help to the plaintiff as no reason was put forward by the plaintiff for the delay in the service of the said affidavit apart from using the order as a shield. That leaves the application of the plaintiff without any supporting evidence.

For the above reasons, I dismiss the application of the plaintiff with costs to the defendant. Early date to be fixed for the hearing of the suit.

Application dismissed.

Reported by Koay Sook Kuan